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IN THE

Supreme Court of the United States

October Term, A. D. 1942

No. 301

In the Matter of

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Debtor.

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY, et al.,

Petitioners,

vs.

FLORENCE G. HICKS and N. E. CATLIN,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
for the Seventh Circuit
AND BRIEF IN SUPPORT THEREOF.

WILLIAM T. FARICY,
WILLIAM B. HALE,
LOWELL HASTINGS,
Chicago, Illinois,
Attorneys for Petitioners.

STANTON E. HYER,
Rockford, Illinois,

SIDNEY K. JACKSON,
NELSON J. WILCOX,
Chicago, Illinois,
Of Counsel.

August 13, 1942.

MC CORNICK AND HENDERSON, INC., CHICAGO

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Petitioners,

vs.

FLORENCE G. HICKS and N. E. CATLIN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the HONORABLE CHIEF JUSTICE and ASSOCIATE JUSTICES of the SUPREME COURT of the UNITED STATES:

Your petitioners, Charles M. Thomson, as Trustee of the property of Chicago and North Western Railway Company, the United States Trust Company of New York, as Trustee under the General Gold Bond Mortgage of the Chicago and North Western Railway Company, and James E. Lockwood, Jr., file this petition to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered in the above entitled cause on April 8, 1942 (R. 226). Rehearing was denied on June 9, 1942 (R. 227).

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This case was instituted on December 4, 1937, when the respondents filed a petition in the Chicago and North Western Railway Company Reorganization Proceedings, pending in the United States District Court for the Northern District of Illinois, Eastern Division, to challenge the Railway Trustee's title to, and use of, a strip of land located a short distance north of the City of Rockford, Illinois (R. 2-11), which strip was acquired by deed in 1863 (R. 98-100), and for many years has been used for railroad right of way. Portions of this strip of land, on each side of the railroad track there in use, were leased, in 1937, to petitioner Lockwood as a site for a bulk oil station and retail filling station (R. 117-26). Due to the execution and delivery by the Railway Trustee of this lease to Lockwood, the respondents precipitated the present controversy (R. 4-7).

The petition was amended twice (R. 19, 58). The District Court referred the entire matter to a Special Master (R. 25). After taking proof, hearing arguments and examining briefs, the Special Master filed a report, including therein an opinion and findings of fact and conclusions of law, holding that the respondents were not entitled to any of the relief sought (R. 151-185). Exceptions to the Special Master's report were filed by the respondents (R. 185-192). After oral argument, these exceptions were overruled by the District Court and a decree was entered confirming and adopting the report and dismissing the respondents' petition (R. 193-195). The respondents appealed the case to the United States Circuit Court of Appeals and, on April 3, 1940, that Court handed down an opinion affirming the District Court (R. 210-16). Thereafter, the respondents filed a petition for rehearing (R. 217). On January 3, 1941, the

Circuit Court of Appeals entered an order withdrawing its opinion (R. 217). The court handed down a second opinion on April 8, 1942, and, this time, reversed and remanded the case to the District Court (R. 218-25). The petitioners then filed a petition for rehearing (R. 227), and on June 9, 1942, rehearing was denied (R. 227).

The deed here in question is dated June 19, 1863, and by it Mary A. Camp and James S. Camp, in consideration of one hundred dollars, conveyed to the Trustee of the Kenosha Rockford and Rock Island Rail Road Company (predecessor of the Chicago and North Western Railway Company) the strip of land, fee title to which is now claimed by both the petitioner Charles M. Thomson, as Trustee of the property of Chicago and North Western Railway Company, and the respondents. The strip contains one and fifteen hundredths acres (R. 98).

Mary A. Camp was the owner of the land and James S. Camp joined in the conveyance as her husband (R. 99-100). The grantors remised, released, sold, conveyed and quitclaimed to the grantee "or his successor forever" all of their right, title, interest, claim and demand in the land described as follows (R. 98):

> "A strip of land fifty feet in width on each side of the center line of the track of the Kenosha Rockford and Rock Island Rail Road as the same is now laid through a part of the southeast fractional quarter of Section thirteen (13), Township forty-four (44) North Range one (1) east of the third principal meridian. Said Center of the track bounded as follows: Commencing nineteen chains and fifty-seven links (1957) West of the Northeast corner of said Quarter section, thence in a southwesterly direction on a curve with a radius of Five thousand seven hundred thirty feet a distance of five hundred two feet (502), containing one and fifteen hundredths acres (1.15/100)."

The controversy in this case has arisen because of language contained in the *habendum* clause of the deed (R.98-99). This clause reads as follows:

> "To have and to hold the same together with all and singular the appurtenances and privileges thereunto belonging or in any wise thereunto appertaining and all the estate right title and interest and claim whatever of the said party of the first part either in law or in equity to the only proper use, benefit and behoof of the said party of the second part and his successors forever for railroad purposes only. And the said party of the first part for themselves and their heirs, executors and administrators doth covenant promise and agree to and with the said party of the second part his successors that they have not made, done, committed executed or suffered any act or acts, thing or things whatsoever whereby or by means whereof the above mentioned and described premises or any part or parcel thereof now or at any time hereafter shall or may be impeached charged or incumbered in any manner of way whatsoever."

(For the convenience of the Court, a copy of the deed is set forth in Appendix A.)

On November 20, 1865, Mary A. Camp and James S. Camp, in consideration of $1400.00, deeded to Lysander C. Jacoby a 71-acre tract of land, including within the description the strip referred to above but excluding from the warranty "certain rights of the Rail Road in one 15/100 acres thereof" (R. 102).

Lysander C. Jacoby and Mary A. Jacoby, on December 27, 1870, conveyed to the Chicago and North Western Railway Company part of the strip of land previously conveyed by the Camp deed and also conveyed an additional strip of land lying to the south of the original parcel, plus a small triangular plot adjoining the northeast corner of the original strip (R. 103-6, 135). Although the respondents

have contended that this second deed superseded the Camp deed, neither the Special Master, the District Court nor the Circuit Court of Appeals have agreed with this contention (R. 184-5; 194 and 214-15).

It is admitted by counsel for the respondents that if, by virtue of the deeds, the Railway Company acquired more than an easement in the land, the respondents are not the proper parties to maintain the proceeding, as they claim as grantees and not as heirs of the original grantors (R. 37, 171-2).

The lease to petitioner Lockwood is on the standard form used by the Land Department of the Railway Company (R. 65). The term is five years, but it is provided that either party may at any time terminate the lease by giving thirty days' notice of intention to do so (R. 124). It was approved by the Illinois Commerce Commission (R. 126).

A map (R. 135) which shows, among other things, the location of the property conveyed by the Camp and Jacoby deeds in relation to a highway intersection at the time the map was made in 1938, was received in evidence as Trustee's Exhibit A (R. 60-61). In accordance with the findings of the Special Master (R. 183-85), it is correct to state also, that the strips of land which have been leased to Lockwood for a bulk oil station and retail filling station are accurately shown in black outline on this map.

In the Circuit Court of Appeals' opinion of April 3, 1940 (R. 210-16), the court determined that the Camp deed conveyed fee title; that the Jacoby deed was void to the extent that it overlapped the Camp deed; that there had been no abandonment by the railroad or its trustee; and that the leased premises were located wholly upon the Camp deed property. The court's opinion of April 8, 1942 (R. 218-25), differs from the first opinion in that it holds

that the Camp deed did not convey the fee but only an easement and also holds that the lease to Lockwood is not a proper use of the servient land.

OPINION BELOW.

The Circuit Court of Appeals' opinion of April 8, 1942 (rehearing denied June 9, 1942) is reported in 127 Fed. (2d) 1001 (R. 218-25). Its previous opinion is in the record (R. 217).

JURISDICTION.

The judgment of the Circuit Court of Appeals here sought to be reviewed was entered on April 8, 1942, and became final on June 9, 1942, when the petition for rehearing was denied (R. 227). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A. Section 347(a)).

QUESTIONS PRESENTED.

1. Under Illinois law, did the Camp deed convey only a right of way easement, or did it convey a greater estate?

2. Even if the deed conveyed only a right of way easement, under Illinois law, is the temporary leasing of part of the property conveyed for a gasoline filling station a proper use?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Circuit Court of Appeals in the opinion here sought to be reviewed has decided important questions of Illinois law in a way in conflict with the applicable Illinois decisions, and has reached a result contrary to its own previous conclusion in this case.

I.

The Circuit Court of Appeals should have held that the Camp deed conveyed fee title and in support of this proposition petitioners show to this Court the following:

(a) The Circuit Court of Appeals erred in relying primarily upon *Tallman* v. *Eastern Illinois & Peoria Railroad Co.*, Ill. Sup. March 17, 1942, 41 N. E. (2d) 537, and in according to that case wholly unwarranted significance.

(b) The court erred in holding that the *Tallman* case made unnecessary any discussion of the Illinois Supreme Court's decisions in *Downen* v. *Rayburn*, 214 Ill. 342, *Tinker* v. *Forbes*, 136 Ill. 221, and *Board of Supervisors* v. *Patterson*, 56 Ill. 111, which are authority for the proposition that the Camp deed conveyed the fee.

(c) The court erred in failing to decide that, under the Illinois decisions, particularly, *Magnolia Petroleum Co.* v. *West*, 374 Ill. 516, the respondents herein, in order to prevail, should have proved, but did not prove, that the language of the deed, the attendant circumstances, and the objects in view, as well as the interpretation of the parties, disclosed an intention to grant an easement rather than the fee.

II.

The Circuit Court of Appeals should have held that the lease and use of the property in question for a filling station is proper and in holding such lease and use improper, the court erred in the following respects:

(a) It founded its opinion on a plain *obiter dictum* in an Illinois decision, in the face of the rule in that State that an opinion of its Supreme Court is authority only for what is actually decided.

(b) It did not follow Illinois decisions holding that the propriety of the corporate use of real estate is to be determined by the express and implied powers of the corporation and the decisions holding that corporations, including railroad corporations, owning real estate in good faith, against present or future requirements, may temporarily lease portions thereof to third persons, in order to obtain revenue.

PRAYER FOR RELIEF.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Seventh Circuit to certify the record, to the end that the judgment of that court entered April 8, 1942 (rehearing denied June 9, 1942) be reversed with directions to affirm the decree of the District Court in this case.

WILLIAM T. FARICY,
WILLIAM B. HALE,
LOWELL HASTINGS,
Attorneys for Petitioners.

STANTON E. HYER,
SIDNEY K. JACKSON,
NELSON J. WILCOX,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The statement of the ground on which the jurisdiction of this court is invoked, a concise statement of the case containing all that is material to the consideration of the questions presented, and specification of errors to be urged, are contained in the accompanying petition.

SUMMARY OF ARGUMENT.

I.

THE CAMP DEED CONVEYED FEE SIMPLE TITLE, AND NOT AN EASEMENT AS DECIDED BY THE CIRCUIT COURT OF APPEALS IN ITS SECOND OPINION IN THIS CASE.

(a) The Circuit Court of Appeals erred in relying primarily upon *Tallman* v. *Eastern Illinois & Peoria R. Co.*, Ill. Sup. March 17, 1942, 41 N. E. (2d) 537, and in according to that case wholly unwarranted significance.

(b) The Court erred in holding that the *Tallman* Case made unnecessary any discussion of the Illinois Supreme Court's decisions in *Downen* v. *Rayburn*, 214 Ill. 342, *Tinker* v. *Forbes*, 136 Ill. 221, and *Board of Supervisors* v. *Patterson*, 56 Ill. 111, which are authority for the proposition that the Camp deed conveyed the fee.

(c) The Court erred in failing to decide that, under the Illinois decisions, particularly, *Magnolia Petroleum Co.* v. *West*, 374 Ill. 516, the respondents, in order to prevail, should have proved, but did not prove, that the language of the Camp deed, the attendant circumstances and the objects in view, as well as the interpretation of the parties, disclosed an intention to grant an easement rather than the fee.

II.

THE LEASE AND USE OF THE PROPERTY IN QUESTION FOR A FILLING STATION IS PROPER.

(a) The Circuit Court of Appeals' holding with respect to the lease to Lockwood is founded upon an *obiter dictum* in an Illinois decision, in the face of the rule in that State

that an opinion of its Supreme Court is authority only for what is actually decided.

(b) The Circuit Court of Appeals erred in failing to follow Illinois decisions holding that the propriety of the corporate use of real estate is to be determined by the express and implied powers of the corporation and the decisions holding that corporations, including railroad corporations, owning real estate in good faith, against present or future requirements, may temporarily lease portions thereof to third persons, in order to obtain revenue.

ARGUMENT.

I.

THE CAMP DEED CONVEYED FEE SIMPLE TITLE AND NOT AN EASEMENT AS DECIDED BY THE CIRCUIT COURT OF APPEALS IN ITS SECOND OPINION IN THIS CASE.

The Circuit Court of Appeals reached a correct result in its first opinion (R. 210), when it held that the Camp deed conveyed fee title, but, in that opinion, the court made a mistake which it perpetuated in its second opinion (R. 218), for it held that the words in the *habendum* clause, if given effect, would create an easement. In the first opinion, the Circuit Court of Appeals discarded the *habendum* clause as being repugnant to the granting clause, but in its second opinion the court held that the entire deed must be considered, and stated that the liberal rules of construction which were reaffirmed by the Illinois courts as recently as *Tallman* v. *Eastern Illinois & Peoria Railroad Company* (opinion of March 17, 1942), 41 N. E. (2d) 537, must be applied (R. 223). It has been, and still is, the position of the petitioners that the words "for railroad purposes only," which appear in the *habendum* clause of the Camp

deed, are a mere recitation of the purpose of the conveyance. At no time in the course of this litigation have the petitioners admitted that there is anything inconsistent between the granting clause and *habendum* clause of that deed.

It is interesting to note that the doctrine of the Illinois cases, as we conceive it to be, in respect to deeds containing language similar to that in the Camp deed, is in accord with the law generally, whereas, the doctrine of those cases as the court below erroneously construed it, is contrary to the law generally.*

(a) The Circuit Court of Appeals erred in relying primarily upon Tallman v. Eastern Illinois & Peoria R. Co., Ill. Sup. March 17, 1942, 41 N. E. (2d) 537, and in according to that case wholly unwarranted significance.

The Supreme Court of Illinois in the *Tallman* Case had before it a deed entirely different from that here in question. We are setting forth, as Appendix B hereof, a copy of the deed in the *Tallman* Case so that it readily may be compared with the Camp deed, which is printed as Appendix A. Particular attention is directed to the fact that the *Tallman* Case deed contains the words "right of way" in three places and also contains the words "over and across" and to the further fact that in the deed here in question any reference to "right of way" is omitted and the words "over and across" are absent.

The Supreme Court of Illinois said in the *Tallman* Case, 41 N. E. (2d) 537, at page 540:

> "The deed under consideration contains words describing a subject matter which if used separately could each describe a different estate, one of which would be an easement, and the other the fee simple of land contained in the description. In short, if the

* *Quinn* v. *Pere Marquette Ry. Co.*, 256 Mich. 143; 239 N. W. 376, 379.
Phillips Gas & Oil Co. v. *Lingenfelter*, 262 Pa. 500; 105 Atl. 888, 889.

> words 'a strip of land' were absent from the conveyance an easement in fee would pass to the grantee without question; whereas, on the other hand, if all reference to right of way were eliminated a fee simple in the land would result under the authority of *Spierling* v. *Ohl,* 232 Ill. 581, 83 N. E. 1068, 13 Ann. Cas. 430. * * * Upon examination of the deed involved the repeated use of the words 'right of way' attracts attention. * * * The words 'right of way' denote a tenure by which land is held; they are descriptive of the easement right, and not the land to which it is affixed."

Admittedly, in the Camp deed the only words which may be pointed to by the respondents as in any way tending to support their contention that an easement only was conveyed are those contained in the *habendum* clause reading "for railroad purposes only." Those words, we submit, are not at all analagous to the language contained in the *Tallman* Case deed, which was construed to pass an easement. As stated by the Supreme Court of Illinois, "the words 'right of way' denote a tenure by which land is held," but nothing that the Supreme Court of Illinois has said may be construed to mean that a statement of *use* "denotes a tenure by which land is held."

The Circuit Court of Appeals, in the opinion here sought to be reviewed, said (R. 223):

> "It would seem reasonable that the grantor meant the railroad could use the strips, but only for the expressed purposes."

Of course, the grantor meant that the strips could be used for railroad purposes only but what the Court lost sight of is the fact that *use* is a privilege of a holder of the fee as well as a grantee under an easement.

The Circuit Court of Appeals also said (R. 223):

> "The words in the *habendum* were more than descriptive of purpose: they were the essence of the whole grant made by Camp; they were intended to describe the estate."

We submit that in the sentence just quoted the Court begged the crucial question in this case. When the Court indicated that the controversial words "were the essence of the whole grant made by Camp," we believe, it only meant that those words indicated that the subject matter of the grant should be restricted to a specified use. The subject matter of the grant could just as logically be an absolute fee simple title as an easement. The Court's conclusion that "they were intended to describe the estate" is a *non sequitur*.

The Circuit Court of Appeals then said (R. 223):

> "We must therefore hold that the Camp deed gave the railroad only an easement" (citing *Tallman* v. *Eastern Illinois & Peoria R. Co.*, 41 N. E. (2d) 537).

We believe that a careful reading of the *Tallman* Case can lead only to the conclusion that nothing therein contained supports the holding that the Camp deed gave the railroad an easement rather than fee title.

(b) The Court erred in holding that the Tallman Case made unnecessary any discussion of the Illinois Supreme Court's decisions in Downen v. Rayburn, 214 Ill. 342, Tinker v. Forbes, 136 Ill. 221, and Board of Supervisors v. Patterson, 56 Ill. 111, which are authortiy for the proposition that the Camp deed conveyed the fee.

The Circuit Court of Appeals in its opinion of April 8, 1942, said (R. 224):

> "Appellees cite *Carter Oil* v. *Welker*, 112 F. (2d) 299; *Downen* v. *Rayburn*, 214 Ill. 342; *Tinker* v. *Forbes*, 136 Ill. 221, and *Supervisors* v. *Patterson*, 56 Ill. 111, as authority for the proposition that a fee was given. It is sufficient to say that the *Tallman* case makes any discussion of these cases unnecessary."

The deed in *Carter Oil Co.* v. *Welker*, 112 F. (2d) 299, and the deed in the *Tallman* Case are nearly identical and

we therefore agree with the Circuit Court of Appeals that, in view of the *Tallman* Case, any discussion of the *Carter Oil Company* Case is unnecessary. We submit, however, that the Court misunderstood the *Tallman* Case when it said that the decision therein made unnecessary any discussion of *Downen* v. *Rayburn, Tinker* v. *Forbes,* and *Board of Supervisors* v. *Patterson.*

The Supreme Court of Illinois said in the *Tallman* Case, 41 N. E. (2d) 537, (p. 541):

> "The *Patterson case,* after the word 'grant' contains a recital that the lot was conveyed for the purpose of building thereon a court house. The *Downen case* in like manner provided that the land should be used for a church location. In neither case was a right of reentry for conditions broken reserved. The purposes set out did not describe 'an estate,' nor was there anything in the deeds to make the words effective as a condition."

In the *Tallman* Case, when referring to *Tinker* v. *Forbes,* the Supreme Court of Illinois said (p. 541):

> "In that case the deed contained a provision that land was to be used as a location for a water wheel, which was held descriptive of a purpose not limiting the fee, but the same deed also contained another clause, viz.—'no building is to be erected' as to create a fire hazard, which, notwithstanding the words of general grant, were given effect as an easement and enforcible by an adjoining property owner. In the Forbes deed we perceive that words creating an easement were given effect, and general purpose words given no effect."

It is important to understand that the general purpose words in the Forbes deed which did not limit the fee were "for the purpose of locating proper water-wheel and races, to draw said water" and that the building restrictions, which followed, were held not to change the fee in the land conveyed to an easement, but to provide a reservation to

the grantor of an incorporeal right in the land granted, such right being an equitable easement. *We wish to emphasize that in the Forbes deed the grantor reserved an easement for the benefit of adjoining property and the grantee obtained the fee, subject to that easement.* This reservation is made amply plain in the opinion in *Tinker* v. *Forbes,* 136 Ill. 221, where the Court said (pp. 241-42):

> "The limitation in that deed is in the nature of an exception or reservation to the grantor of an incorporeal right in the land granted, and the reservation being made for the benefit of the adjoining half lot, such right is in the nature of an equitable easement appurtenant to that half lot. *Fuller* v. *Arms,* 45 Vt. 400; *Ayling* v. *Kramer,* 133 Mass. 12; 2 Washburn on Real Property, 2. The conveyance of the west half of said lot through mesne conveyances to the complainant, vested said easement in her as appurtenant to the property thus conveyed. Where an easement has become appurtenant to a dominant estate, a conveyance of that estate carries with it the easement belonging to it, whether mentioned in the deed or not. 2 Washburn on Real Property, 317."

In the *Tallman* Case, the Supreme Court of Illinois said that its attention had been called to decisions of the United States Courts in the Seventh and Eighth Circuits, construing the Illinois law as applied to deeds containing substantially the same provisions wherein different conclusions had been reached in the two Circuits and then said (p. 543):

> "We recognize the great respect to which the opinions of these courts are entitled, but deem it unnecessary to comment upon the analysis of the law therein expressed further than to say all of the cases cited were announced prior to the case of *Magnolia Petroleum Co.* v. *West, supra* [374 Ill. 516], wherein we pointed out the application of the Conveyance Act to deeds of this character, and the limited effect of the *Downen* and like cases."

The Supreme Court of Illinois in *Magnolia Petroleum Co.* v. *West,* 374 Ill. 516, in commenting upon *Downen* v. *Rayburn* and *Board of Supervisors* v. *Patterson,* said (page 522):

> "Each of the latter cases was predicated upon a conveyance of the fee, holding that it could not be restricted by subsequent language descriptive of its use."

If the Circuit Court of Appeals, when it said that it was not necessary to discuss *Downen* v. *Rayburn, Tinker* v. *Forbes* and *Board of Supervisors* v. *Patterson,* meant that the *Tallman* Case overruled those earlier Illinois decisions, the above quotations show that the Circuit Court of Appeals was in error. If, on the other hand, the Court did not mean to indicate its understanding that the earlier decisions were overruled, it erred in failing to give recognition to those cases, for they support the proposition that the Camp deed conveyed fee title.

(c) The Court erred in failing to decide that under the Illinois decisions, particularly, Magnolia Petroleum Co. v. West, 374 Ill. 516, the respondents, in order to prevail, should have proved, but did not prove, that the language of the Camp deed, the attendant circumstances and the objects in view, as well as the interpretation of the parties, disclosed an intention to grant an easement rather than the fee.

The court below, in its second opinion, referred to the decision of this Court in *Thompson, Trustee* v. *Magnolia Petroleum Co., et al.,* 309 U. S. 478, wherein it was held that the bankruptcy court abused its discretion by not sending a question of Illinois property law to the appropriate state court. The court below then said (R. 222):

> "Clearly, in the light of recent Illinois decisions, there is no such uncertainty as to require sending the case to the state court."

The "recent Illinois decisions" are the *Tallman* Case, which the Circuit Court of Appeals relied upon principally, and *Magnolia Petroleum Co.* v. *West,* 374 Ill. 516 (decided in 1940). Both of these cases were decided after the case here sought to be reviewed was briefed, argued and decided the first time by the Circuit Court of Appeals (R. 210). In its opinion, the Circuit Court of Appeals does not lay much stress upon the *West* Case, but it should here be pointed out that, like the *Tallman* Case, the *West* Case furnished no support for the Circuit Court of Appeals' holding that the Camp deed did not convey the fee. The Supreme Court of Illinois explained its holding that an easement only was granted in the *West* Case as follows (p. 523):

> "The words of limitation in the deed from Beattie Francis to August Wiese, as applied to the conveyance of a narrow strip running along the edge of the grantor's property from the road to the land of the grantee, discloses an intention to grant merely a right of way, and the words 'convey and warrant' are as compatible with this intention as with the conveyance of a fee. *The language of limitation, 'to be used for road purpose,' is ambiguous. Surrounding circumstances and the objects of the parties fortify the construction that an easement was intended.* The location of the Wiese property, having no connection with the road, the use of the Francis tract as a means of access, and the position of the strip, not adjoining the grantee's other tract, so that it might be utilized as more than a roadway, all compel this conclusion. Moreover, Wiese and his heirs have interpreted the deed in accordance with this evident intention. They did not cultivate, but used the strip only as a road. In various inventories and the lease to T. R. May, purporting to cover all of their interests in section 15, they asserted no title to the strip, and in an amended inventory, filed after the execution of the Hamilton lease, claimed an interest in it only as a roadway. *The language of the deed, the attendant circumstances and the objects in view, as well as the*

interpretation of the parties clearly disclose an intention to grant no more than an easement." (Emphasis supplied.)

Applying the criteria provided in the above excerpt from the *West* Case to the record herein, it is obvious that the respondents failed to prove that by the Camp deed anything less than fee title was conveyed. The Supreme Court said in the *West* Case that the words "to be used for road purpose" are ambiguous. We believe that the words in the Camp deed reading "for railroad purposes only" are perfectly plain. The grant in our case was to a trustee of a railroad and "his successor forever" and it was reasonable to suppose that any and all property which that railroad trustee "or his successor" held would be used for railroad purposes. Any other use, would be *ultra vires*. That fact, however, could not prevent the Trustee, or the railroad company from holding fee title to the property conveyed by the Camps, or to any other property. *Spierling* v. *Ohl*, 232 Ill. 581.

The intention of the grantees in the Camp deed to convey fee simple title to the railroad trustee is made doubly plain by the second certificate which is attached to and made part of that deed (R. 99-100). That certificate reads as follows:

"State of Illinois }
"Su County. } ss.

"I, Charles Ruxton, a Notary Public for town of Dixon in and for said County in the State aforesaid do hereby certify that Mary A. Camp and James S. Camp who are personally known to me as the real persons whose names are subscribed to the within deed appeared before me this day in person and acknowledged that they executed and delivered the said deed as their free and voluntary act for the uses and

purposes therein set forth. And the said Mary A. Camp wife of the said James S. Camp having been by me examined separate and apart and out of the hearing of her husband and *the contents and meaning of the said deed having been by me made known and fully explained to her acknowledged that she had freely and voluntarily executed the same and relinquished her dower and all other interest of any kind whatsoever to the lands and tenements therein mentioned without compulsion of her said husband and that she does not wish to retract the same.* Given under my hand and Notarial seal this fifth day of September, A. D. 1863. (Emphasis supplied.)

Charles Ruxton
SS N.P."

The record shows that Mary A. Camp acquired title to the property here involved in 1854 (R. 95-96).

If the language of the Camp deed were ambiguous and if it were necessary, for that reason, as in the *West* Case, to attempt to discover the intention of the parties at the time the deed was executed, what better evidence could have been offered than the certificate of the Notary Public who examined the grantors and explained to Mrs. Camp the meaning of the deed and who recorded that she "*relinquished her dower and all other interest of any kind whatsoever to the lands and tenements therein mentioned* • • •"?

We believe that if it is not clear that we are correct in our interpretation of the Illinois law, as applied to the facts in this case, the most that can be said on behalf of the respondents is that some "uncertainty" exists. In that event, we assume that this Court will follow its decision in *Thompson, Trustee,* v. *Magnolia Petroleum Co., et al.,* 309 U. S. 478, and require the questions here presented to be submitted to the Illinois courts.

II.

THE LEASE AND USE OF THE PROPERTY IN QUESTION FOR A FILLING STATION IS PROPER.

The opinion of the Circuit Court of Appeals (R. 218-225) finds that:

(1) The line of railroad involved is five and one-half miles in length;

(2) The area served is rich in potential and industrial developments, and the line serves private industries and is avaliable to the shipping public;

(3) The line is presently in operation and produced $200,000 in revenue in 1937; and

(4) The lease of the property to Lockwood contained a provision empowering either party to terminate it on 30 days' notice.

There is no suggestion of bad faith on the part of the railroad in respect to the quantity of land originally acquired and now held at the point in question. It is not intimated that the railroad failed to exercise fair discretion or judgment as to the amount of land necessary to meet possible requirements. The leasing of the land to Lockwood did not impede or hinder the trustee of the railroad in the discharge of his duty to the public.

The problem then becomes this: May a railroad which holds land for railroad purposes lease a part thereof, temporarily, to a third person, such part not being presently necessary for actual operation, and in so doing stay within the limits defined as "railroad purposes"? The Circuit Court of Appeals answered that question in the negative and held that the lease and use of a portion of the property for a filling station was a misuse of the servient land. We

believe that the applicable decisions of the Illinois Supreme Court do not support the holding of the Circuit Court of Appeals but, on the contrary, afford ample authority for holding that, even if the court were correct in concluding that the trustee of the Chicago and North Western Railway Company has only an easement in the property conveyed by the Camp deed, the lease to Lockwood is a proper railroad use.

(a) The Circuit Court of Appeals' holding with respect to the lease to Lockwood is founded upon an obiter dictum in an Illinois decision, in the face of the rule in that state that an opinion of its Supreme Court is authority only for what is actually decided.

The position of the Circuit Court of Appeals was bottomed upon a quotation from *R. I. & P. Ry. Co.* v. *Leisy Brewing Co.*, 174 Ill. 547, 549. The Circuit Court of Appeals quoted language from Lance's Appeal, 55 Pa. St. 16, as having been "expressly approved" in the *Leisy Brewing Co.* Case. An inspection of the latter case reveals that, while the Supreme Court of Illinois did say that it did not doubt the correctness of the doctrine laid down in numerous cases, including Lance's Appeal, the statement was plain *obiter dictum*, for the Court immediately went on to state "the cases referred to by counsel have no relation to the matters here under consideration." The decision in the *Leisy Brewing Co.* Case is authority only for what was actually there decided and not for the proposition relied on by the Circuit Court of Appeals in its opinion. *People* v. *Chapman*, 370 Ill. 430, 435.

(b) The Circuit Court of Appeals erred in failing to follow Illinois decisions holding that the propriety of the corporate use of real estate is to be determined by the express and implied powers of the corporation and the decisions holding that corporations, including railroad corporations,

owning real estate in good faith, against present or future requirements, may temporarily lease portions thereof to third persons, in order to obtain revenue.

In relying upon the dictum in the *Leisy Brewing Co.* Case, the Circuit Court of Appeals by-passed a determinative formula established by Illinois decisions. This formula develops as follows:

(1) In respect to real estate holdings, whether in fee by an industrial corporation or an easement by a railroad company, the company can acquire and hold the property only for its corporate or railroad purposes.

> *People* v. *Pullman Palace Car Co.*, 175 Ill. 125;
> *C. & N. W. Ry. Co.* v. *Town of Cicero*, 157 Ill. 48, 53.

(2) In such acquisition and holding, the company is not limited to its immediate requirements but may make provision for possible future needs. *People* v. *Pullman Palace Car Co.*, 175 Ill. 125.

(3) When properties so held, or facilities constructed thereon, are not immediately needed for operating purposes, the company may, by temporary arrangement by lease or contract, acquire revenue therefrom; and it is not required to let property held in good faith become unproductive.

> *People* v. *Pullman Palace Car Co.*, 175 Ill. 125;
> *Dickman* v. *Madison County Light Company*, 304 Ill. 470;
> *Dauchy Iron Works* v. *Grunder*, 150 Ill. App. 604, 608.

When the Camps deeded the land for railroad purposes, they conveyed it for those uses which then were, and in the

future would be, lawful uses by a railroad company in the operation of its road. The land was subject to use by the grantee under its express and implied powers. To interpret the grant otherwise, would lead to utter confusion.

A direct application of the above mentioned formula to a railroad company was made in the case of *Dickman* v. *Madison County Light Co.*, 304 Ill. 470. There, it appeared that the railroad, anticipating future requirements, erected a power plant generating excess power. It contracted to sell the excess to the power company. To deliver the power, it constructed and maintained a power line on its right of way easement. The wires of the power line were owned by the power company. The current so delivered was of a nature not usable by the railroad.

The owner of the servient land made a direct attack against the power company, contending that the additional use was unlawful and was an unwarranted burden. In disposing of the contention the Supreme Court of Illinois stated in its opinion (p. 483):

> "It [the contract between the companies]* is legal if the excess power was provided for in good faith by the Traction Company for its future requirements as a railroad company, provided a further showing is made that such excess power is reasonably necessary for its future use and that it has a contract with the power company for only temporary sale of such excess power and may itself use the same when its future growth in business or other causes may make it necessary to employ such excess power in the business for which it is incorporated."

On page 481 of its opinion in that case, the Supreme Court of Illinois adopted the rule in *People* v. *Pullman Palace Car Co.*, 175 Ill. 125, and applied it to right of way uses.

---

*Words in brackets supplied.

In the latter case, the Supreme Court of Illinois had been called upon to decide whether a corporation could rent excess space in its office building which, to meet anticipated requirements, it had constructed larger than necessary. The Court answered the question in the affirmative.

The Railroad Trustee in the present case holds the right of way for present and future requirements flowing from the tapping of a potentially rich industrial area (R. 220). The railroad has maintained at all times its service to shippers and has performed its duty to the public. The Trustee found himself in a position to lease a small portion of the right of way to Lockwood without interrupting railroad service. He made the arrangement on a basis which permitted taking over the leased premises for actual operating purposes on thirty days' notice (R. 124, 220). Thus, under the facts, there is presented a typical case of a temporary lease or use for revenue purposes of temporary excess property or facilities. Such lease or use is within the corporate powers, express or implied. This being so, even if the Trustee held only an easement, no unwarranted burden was imposed on the servient land.

The petitioners submit, therefore, that the Circuit Court of Appeals erred in relying upon the *obiter dictum* in the *Leisy Brewing Co.* Case and in failing to adopt and apply the rule established by the cases of *People* v. *Pullman Palace Car Co.* and *Dickman* v. *Madison County Light Co.*, under which the lease challenged by the respondents was a proper use.

CONCLUSION.

It is, therefore, respectfully submitted that, as the Circuit Court of Appeals for the Seventh Circuit has decided important questions of Illinois law in a way in conflict with

the applicable Illinois decisions, this case is one calling for the exercise by this Court of its supervisory powers and that a writ of certiorari should be granted as prayed in the accompanying petition and this Court should review the decision of the court below and finally reverse it.

Respectfully submitted,

WILLIAM T. FARICY,
WILLIAM B. HALE,
LOWELL HASTINGS,
Attorneys for Petitioners.

STANTON E. HYER,
SIDNEY K. JACKSON,
NELSON J. WILCOX,
Of Counsel.

August 13, 1942.

APPENDIX A.

The Camp Deed (Transcript of Record pages 98-100).

"This Indenture, Made this Nineteenth day of June in the year of our Lord, one thousand eight hundred and sixty-three, Between Mary A. Camp and James S. Camp, parties of the first part, and B. Williamson, Trustee of the Kenosha Rockford and Rock Island Rail Road Company of the City of Elizabeth County of Union and State of New Jersey, party of the Second part, Witnesseth. That the said party of the first part for and in consideration of One hundred dollars, in hand paid by the said parties of the Second part the receipt whereof, is hereby acknowledged, and the said parties of the second part forever released and discharged therefrom have remised, released sold and conveyed and quit claimed and by these presents do remise, release sell convey and quit claim unto the said party of the second part or his Successor forever all the right, title interest claim and demand which the said party of the first part had in and to the following described lot, piece or parcel of land, to-wit:

A strip of land fifty feet in width on each side of the center line of the track of the Kenosha Rockford and Rock Island Rail Road as the same is now laid through a part of the southeast fractional quarter of Section thirteen (13), Township forty-four (44) North Range one (1) east of the third principal meridian. Said Center of the track bounded as follows: Commencing nineteen chains and fifty-seven links (1957) West of the Northeast corner of said Quarter section, thence in a southwesterly direction on a curve with a radius of Five thousand seven hundred thirty feet a distance of five hundred two feet (502), containing one and fifteen hundredths acres (1.15/100).

The said grantee or his successors to make and maintain a good fence on each side of the said premises and all necessary crossings at grade. To have and to hold the same together with all and singular the appurtenances and privileges thereunto belonging or in any wise thereunto appertaining and all the estate right title and interest and claim whatever of the said party of the first part

either in law or in equity to the only proper use, benefit and behoof of the said party of the second part and his successors forever for railroad purposes only. And the said party of the first part for themselves and their heirs, executors and administrators doth covenant promise and agree to and with the said party of the second part his successors that they have not made, done, committed executed or suffered any act or acts, thing or things whatsoever whereby or by means whereof the above mentioned and described premises or any part or parcel thereof now or at any time hereafter shall or may be impeached charged or incumbered in any manner of way whatsoever.

In witness whereof the said party of the first part hereunto set our hand and seal the day and year first above written.

Mary A. Camp, (Seal)

James S. Camp. (Seal)

Signed, sealed and delivered in
the presence of

.....

State of Illinois }
Su County. } ss.

I, Chas. Ruxton, a Notary Public in and for the said County and State aforesaid do hereby certify that Mary A. Camp and James S. Camp personally known to me as the same persons whose names are subscribed to the foregoing instrument of writing appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument of writing as their free and voluntary act for the uses and purposes therein set forth.

Given under my hand and seal this twenty-fourth day of June, A. D. 1863.

Charles Ruxton
N.P. SS

State of Illinois }
Su County. } ss.

I, Charles Ruxton, a Notary Public for town of Dixon in and for said County in the State aforesaid do hereby certify that Mary A. Camp and James S. Camp who are personally known to me as the real persons whose names are subscribed to the within deed appeared before me this day in person and acknowledged that they executed and delivered the said deed as their free and voluntary act for the uses and purposes therein set forth. And the said Mary A. Camp wife of the said James S. Camp having been by me examined separate and apart and out of the hearing of her husband and the contents and meaning of the said deed having been by me made known and fully explained to her acknowledged that she had freely and voluntarily executed the same and relinquished her dower and all other interest of any kind whatsoever to the lands and tenements therein mentioned without compulsion of her said husband and that she does not wish to retract the same. Given under my hand and Notarial seal this fifth day of September, A.D. 1863.

Charles Ruxton
SS N.P."

APPENDIX B.

The Deed in the *Tallman* Case (Opinion of Supreme Court of Illinois March 17, 1942) 41 N.E. (2d) 537,538-9.

"RIGHT OF WAY DEED.

This Indenture Witnesseth, That D. E. Withers, and his wife, Nancy A. Withers, of the County of Imperial, in the State of California, owner of the parcels of land herein below described in consideration of the benefits accruing to them by reason of construction and operation of a railroad upon said land, and the sum of Eight Hundred & no/100 Dollars, in hand paid, the receipt whereof

is hereby acknowledged, does hereby convey and warrant to Eastern Illinois and Peoria Railroad Company, a corporation, organized and existing under the laws of the State of Illinois, as and for its right of way, a strip of land One Hundred (100) feet wide, being Fifty (50) feet wide on each side, of a line that has been surveyed and located across and upon the following described real estate, to-wit: Over and across the South West quarter of the South West quarter of the North West quarter Section Seventeen (17); Also the South East quarter of the North East quarter and the West half of the North East quarter of Section Eighteen (18) all in Township Seven (7) North, Range (3) East of the 3rd P. M. Containing in all Eight and Sixteen (8.16) hundreths acres, more or less.

Also if ground is taken before present corn on Right of Way, matures Company shall pay for corn so taken in proportion to balance of corn in field. Situated in the County of Fayette, in the State of Illinois, hereby releasing and waiving all rights under and by virtue of the Homestead Exemption Laws of this State. $612.00 of the above consideration is for land taken and $188.00 is for removal of buildings and Twenty-five (25) apple trees.

This deed is given to correct error in description of former deed, dated August 5th, 1912. Recorded in Book No. 198 of deeds, page 498.

Witness our hands and seals this 24th day of October, A.D. 1912.

D. E. Withers (Seal).

Nancy A. Withers (Seal)."

FILED
SEP 10 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 301

IN THE MATTER OF
CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

DEBTOR.

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL.,

Petitioners,

vs.

FLORENCE G. HICKS AND N. E. CATLIN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

ROY F. HALL,
Rockford, Illinois,
FERRIS E. HURD,
WILLIAM F. PRICE,
Chicago, Illinois,
Attorneys for Respondents.

September 9, 1942.

THE DUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Opinion Below.

The opinion of the Circuit Court of Appeals of April 8, 1942 (R. 218-225) is reported in 127 Fed. (2nd) 1001. Rehearing was denied on June 9, 1942 (R. 227).

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on April 8, 1942 (R. 226). A petition for rehearing was filed and denied on June 9, 1942 (R. 227). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1935 (28 U. S. C. A. Section 347 (a)).

Statement of the Case.

This case arose on a petition filed on December 4, 1937, by plaintiffs Hicks and Catlin (respondents before this Court and hereinafter referred to as such) in railroad reorganization proceedings pending in the District Court of the United States for the Northern District of Illinois. The defendants named therein were the Trustee of the Chicago & North Western Railway Company and James E. Lockwood, Jr. (petitioners before this Court and hereinafter referred to as such). Respondents, as successors in interest of parties who had conveyed an interest in certain property to the railway company and its predecessor for use as a right of way, sought to recover possession of this property or, in the alternative, to enjoin the use of a portion of said property for a private gasoline filling station on the ground that the conveyances gave the grantees only an easement. The portion of the railroad right of way just referred to had been leased by the railroad company to said Lockwood for such use and at the time of the hearing it was being so used. Said filling station, however, had not been constructed at the time the respondents filed their petition (R. 2-9).

The matter was heard before a special master, who issued a report concluding that the railroad company had acquired a fee title to the land in 1863 and that the petition should be dismissed (R. 151-185). This report was affirmed by the

district court without discussion of the facts and law (R. 193-195). An appeal was taken to the Circuit Court of Appeals for the Seventh Circuit. On April 3, 1940, that Court handed down an opinion affirming the lower court (R. 210). This opinion was rendered under a mistaken belief that under the Illinois law no consideration could be given to the habendum of the 1863 deed to the railroad (see pages 8 and 9 hereof). The Court's error was pointed out on petition for rehearing and the court subsequently, on January 3, 1941, withdrew its opinion and vacated its judgment (R. 217). On April 8, 1942, the Circuit Court of Appeals handed down its second opinion, in which it held that the 1863 deed to the railroad conveyed an easement only, that under that easement the railroad could use the property only for railroad purposes, and that the use of the property by petitioner James E. Lockwood for a retail gasoline filling station was an improper use (R. 218-225). It is this decision in favor of respondents that the petitioners are here seeking to have reviewed.

Briefly, the facts are as follows:

On June 19, 1863, Mary A. Camp, the owner of a 71-acre tract of farm land situated near Rockford, Illinois (R. 95), made a deed to the Trustee of the Kenosha, Rockford and Rock Island Railroad Company covering two strips of land beginning at the northerly boundary of the tract referred to and extending southerly a distance of 502 feet, 50 feet in width, on each side of the center line of the track of said railroad as the same was then laid out on the land mentioned (R. 98). The strips contained a total of 1.15 acres and the grantee agreed to make and maintain a fence on either side of the premises and all necessary crossings at grade. The habendum in this deed, which will be hereinafter referred to as the "Camp deed," provided that the grantee was to have and to hold the land "to the only proper use, benefit and behoof of the second party and his successors forever for railroad purposes only." Whatever

rights were acquired under this deed were transmitted by succession to petitioner Charles M. Thomson, Trustee of the Chicago & North Western Railway Company.

The strips of land conveyed by the Camp deed were part of the larger 71-acre tract referred to, and at the time that deed was given Mary A. Camp owned the land on either side of the strips described in the Camp deed (R. 95). The entire tract owned by her is represented on Trustee's Exhibit A (R. 135) by the property lying south of Spring Creek Road. This exhibit also shows the location of the railroad right of way and the portion thereof leased to petitioner Lockwood for the gasoline filling station. The property shown on this exhibit was subdivided into lots by respondent Hicks' predecessor and respondent Catlin subsequent to March 2, 1905 (R. 93).

On November 20, 1865, Mary A. Camp conveyed the entire 71-acre tract to Lysander C. Jacoby. This conveyance described the tract by metes and bounds and included the strips of land conveyed by the Camp deed (R. 100-103). There was excepted from the warranty in this deed, *but not from the conveyance*, "certain rights of the railroad in 1.15 acres thereof" (R. 102).

On December 20, 1870, Jacoby made a deed to the Chicago & North Western Railway Company (R. 103) which covered substantially all of the strips conveyed by the Camp deed plus some additional strips. This deed stated that the conveyance was made "for the uses and purposes hereinafter stated and none other" and described the property as "a strip of land 50 feet wide and no more extending on and along the westerly side of the center line of the track of said railway as now laid down and used by the party of the second part *upon the hereinafter described premises of the grantors* and also a strip of land unequal in width extending from the easterly line of the strip aforesaid • • • both of said strips of land to extend from the said half section line to the southern line of the grantors' premises

whereof they are a parcel." (Italics ours.) The habendum of this deed provided that the railroad was "to have and to hold the said strips of land above specified and described and to the party of the second part, its successors and assigns, for railroad uses and purposes and none other as fully and amply and not more so as if the same had been taken and held by condemnation under the statute and subject also to all obligations and liabilities imposed on railroad companies respecting land taken and held by such condemnation" (R. 104).*

On September 3, 1877, Jacoby conveyed the entire 71-acre tract by metes and bounds to his daughters. No reservation as to the rights of the railroad company was made in this deed (R. 108).

On August 3, 1904, one of the Jacoby daughters conveyed the entire 71-acre tract to the other. The description was by metes and bounds and again no reservation was made as to the rights of the railroad (R. 110).

On March 2, 1905, the title to the 71-acre tract was acquired by Herbert S. Hicks and respondent N. E. Catlin, strangers to the Jacoby family, under a deed containing a metes and bounds description. This deed provided that the conveyance was made "subject to the right of way of the Chicago and Northwestern Railway Co. * * *" (R. 112). Herbert S. Hicks was the husband of petitioner Florence G. Hicks. He died prior to the beginning of this suit leaving a will by which he devised to his wife all of his property.

On October 2, 1937, the Railway Company leased a portion of the right of way conveyed by the Camp deed to petitioner James E. Lockwood, Jr., for use as a gasoline filling station" (R. 117-128). The property leased consisted of a portion of the right of way described in the Camp deed and the Jacoby deed to the railroad

*This deed clearly conveyed only an easement to use the property for railroad purposes. See footnote, page 20, *infra*.

averaging about 275 feet in length except 8½ feet on each side of the center of the railroad tracks through the property. The tanks located thereon are old tank cars set on concrete blocks. They are not bulk station tanks. There are no loading racks or pumps for the loading of gasoline out of these tanks. The tanks bear a notation that the station is a "tank car station" and are only used for advertising and for the storage of reserve gasoline for the adjoining station.

Immediately upon learning of this lease counsel for respondents notified petitioner, James E. Lockwood, of respondent's rights in the property covered by the lease (R. 5-7) and on November 16, 1937, filed a suit in the Circuit Court of Winnebago County, Illinois, to restrain said lessee from completing a retail gasoline filling station on said premises which was then in the process of being constructed. This suit was dismissed because an injunction theretofore issued in the railroad reorganization proceeding involving petitioner railway restrained all persons from interfering with the property of the railway and from prosecuting suits against the railway company except in the Federal District Court (R. 7-8). Respondents thereupon filed the petition in the District Court referred to in the opening paragraph of this statement.

Questions Presented.*

1. Whether under the Illinois law the Camp deed to the railroad conveyed only an easement.

2. Whether, assuming only an easement was conveyed, the property can be used for a private retail gasoline filling station by a lessee from the railroad.

* A further question, namely whether the 1870 deed to the railroad, which covered substantially the same property as the Camp deed and which clearly conveyed an easement, superseded the Camp deed, was also presented to the Circuit Court of Appeals. That court, in the opinion here sought to be reviewed, did not pass on this question. Such a ruling was unnecessary in view of its conclusion as to the proper construction of the Camp deed. Accordingly, we shall not discuss this question in this brief.

SUMMARY OF ARGUMENT.

I.

THE COURT BELOW CORRECTLY HELD THAT THE CAMP DEED CONVEYED ONLY AN EASEMENT.

(a) The Circuit Court of Appeals properly applied the rules of construction laid down in *Tallman* v. *E. I. & P. R. R. Co.*, 379 Ill. 441, in arriving at its conclusion that the Camp deed conveyed only an easement.

(b) The Illinois Supreme Court's decisions in *Downen* v. *Rayburn*, 214 Ill. 312, *Tinker* v. *Forbes*, 136 Ill. 221, and *Board of Supervisors* v. *Patterson*, 56 Ill. 111, relied upon by petitioners, do not support the proposition that the Camp deed conveyed a fee.

(c) Even assuming the language of the Camp deed is ambiguous (which we do not admit), the Circuit Court of Appeals correctly found that the Camp deed conveyed only an easement under the doctrine of *Magnolia Petroleum Co.* v. *West*, 374 Ill. 516.

II.

THE USE OF THE PROPERTY IN QUESTION FOR A RETAIL GASOLINE FILLING STATION BY A LESSEE FROM THE RAILROAD IS NOT A PROPER USE.

(a) The Circuit Court of Appeals correctly followed the rule approved in *R. I. & P. Ry. Co.* v. *Leisy Brewing Co.*, 174 Ill. 547, in determining that the use of the property in question for a retail gasoline filling station is not a railroad use.

(b) The cases of *People* v. *Pullman Palace Car Co.*, 175 Ill. 125, *Dauchy Iron Works* v. *Grunder*, 150 Ill. App. 604, and *Dickman* v. *Madison County Light Co.*, 304 Ill. 470, cited by petitioners, are inapplicable to this case.

ARGUMENT.

The petitioners assert as reasons for the allowance of writ of certiorari herein that the Circuit Court of Appeals has decided important questions of Illinois law incorrectly and has reached a result contrary to its own previous conclusion in this case. We will show that the Circuit Court of Appeals in the decision here sought to be reviewed reached the only possible result under the applicable Illinois authorities, and that its two opinions are completely consistent, except that in its earlier and now withdrawn opinion it followed a rule of law inapplicable to this case on the facts and for the applicability of which petitioners do not even now contend.

I.

THE COURT BELOW CORRECTLY HELD THAT THE CAMP DEED CONVEYED ONLY AN EASEMENT.

At the outset of their argument petitioners refer to the first opinion of the Circuit Court of Appeals (R. 210) in which the Court concluded that the Camp deed conveyed a fee, basing its decision on the legal proposition that where the granting clause of a deed contains language broad enough to convey a fee, the estate conveyed cannot be cut down or limited by the habendum (R. 214).

As is recognized in the Court's second opinion here sought to be reviewed, this proposition applies only where the granting clause contains the word "heirs" or definitely describes the estate granted. Where, as in the instant case, words of inheritance are not used and there is nothing in the granting clause definitely defining the estate granted, the habendum or any other part of the deed may be resorted to for the purpose of determining the estate granted and that in such a case the habendum may create less than a fee where the granting clause

standing alone would convey a fee. This is well settled in Illinois. Thus, in *Bear* v. *Millikin Trust Co.*, 336 Ill. 366, the Illinois Supreme Court in construing a deed to a corporation as trustee said (pp. 380-381):

> "The rule applicable to common law deeds with a granting clause containing the word 'heirs,' that the first of two repugnant clauses shall prevail, does not apply to this deed, in which the estates are not so limited. *In a deed in which words of inheritance are not used the entire context of the instrument may be considered, and every word used, wherever found, must, if possible, give weight in determining the estate granted.*"* (Italics ours.)

This rule was authoritatively restated by the Illinois Supreme Court twice during the two-year period intervening between the first and second opinions of the Circuit Court of Appeals in this case. *Magnolia Petroleum Co.* v. *West*, 374 Ill. 516, 521-522; *Tallman* v. *E. I. & P. R. R. Co.*, 379 Ill. 441, 443-444. Petitioners apparently concede that it is applicable here (See Petition, pp. 10-11).

We wish to emphasize that, once the applicability of this rule and the inapplicability of that relied upon by the Circuit Court of Appeals in its first opinion is recognized, any alleged conflict between the two opinions disappears. Even in its first opinion the Circuit Court of Appeals made clear that, if the habendum could be given effect, the Court would hold that the Camp deed created only an easement. The first opinion stated (R. 214): "In our case * * * the words used in the habendum, if given effect, would create an easement only * * *." Thus under the rule that the habendum clause must be given effect, which petitioners do not challenge, the two opinions of the Circuit Court of Appeals are completely consistent in holding that the Camp deed conveyed only an easement.

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*Other cases to the same effect are *Anderson* v. *Stewart*, 285 Ill. 605, 611-612; *Buck* v. *Garber*, 261 Ill. 378, 382-384; *Riggin* v. *Love*, 72 Ill. 553, 555-556; *Patterson* v. *McCay*, 313 Ill. 491, 492-493; *Harder* v. *Matthews*, 309 Ill. 550, 552; *Bauman* v. *Stoller*, 235 Ill. 480, 489-93; *Cover* v. *James*, 217 Ill. 309, 312-314; *Walker* v. *Shepard*, 210 Ill. 100, 111; and *Welch* v. *Welch*, 183 Ill. 237, 238.

(a) The Circuit Court of Appeals Properly Applied the Rules of Construction laid down in Tallman v. E. I. & P. R. R. Co., 379 Ill. 441, in Arriving at Its Conclusion That the Camp Deed Conveyed Only an Easement.

Petitioners urge that the Circuit Court of Appeals in its second opinion placed unwarranted significance on the Illinois Supreme Court's decision in *Tallman* v. *E. I. & P. R. R. Co.*, 379 Ill. 441. Their argument is predicated principally on the proposition that the language of the deed there under consideration is not precisely the same as that of the Camp deed. We do not contend that it is. We do, however, contend that the principles of construction laid down in that case are equally applicable here and that the Circuit Court of Appeals correctly applied those principles.

In the *Tallman* case the Illinois Supreme Court, after carefully reviewing its prior decisions dealing with the rules of construction applicable to deeds in Illinois, concluded as follows (pp. 453-454):

> "* * * The principle is also clearly stated in *Bauman* v. *Stoller*, 235 Ill. 480, as follows: 'The words of grant, "convey and warrant," convey the fee unless they are limited to a lesser estate by words found in the granting clause or in the *habendum* of the deed, if it contained an *habendum*. * * * where there is language, either in the granting clause or in the *habendum* of the deed, limiting the estate conveyed by such granting words to one less in extent than a fee, such words of limitation will be given effect.'
>
> "The rule that a fee simple is deemed to have been conveyed applies when the 'estate' to be conveyed is ascertained. The 'estate' is not ascertained by the use of the words 'convey and warrant' alone. The entire deed must be examined to ascertain what 'estate' the parties intended to convey. We therefore examine all of the words of the granting clause, *viz.*,—'convey and warrant * * * as and for its right of way a strip of land 100 feet wide * * * over and across' the de-

scribed land, and ascertain the 'estate' intended to be conveyed, that is, whether a *use* of the land, or *all* of the land, and when that intention is found, in accordance with the rules of construction referred to above, we apply the statute to any other language which may affect the estate described in the granting clause. When we do this, general purpose words which do not describe a tenure or estate will not cut down the estate, but words which do describe a tenure or estate may not be disregarded as merely descriptive of a purpose, but must be examined in the light of the entire instrument, and, if descriptive of the thing granted, must be given effect.

"Applying the above principles, we are of the opinion the description of the estate contained in the granting clause is that of a right of way easement, and not a fee simple interest in the land within the described boundaries. Such construction gives effect to all of the words in the deed. Any other construction would require us to disregard words necessary to determine the estate granted."

In the Illinois Supreme Court's decision in *Magnolia Petroleum Co.* v. *West*, 374 Ill. 516, which was cited and relied upon in the *Tallman* case, the Court said (pp. 521-522):

"The deed in question is in the form prescribed by section 9 of the Conveyances act (Ill. Rev. Stat. 1939, chap. 30, par. 8, p. 796), containing no words which at common law would convey an estate of inheritance. Section 13 of the act provides that a deed in this form will be deemed to have conveyed a fee simple estate of inheritance if a less estate is not limited by express words, or does not appear to have been granted by construction or operation of law. *The manifest meaning of the latter section is, that when words of inheritance are not used, every word, no matter where situated in the deed, is to be given weight in determining the estate granted.* (*Woods* v. *Seymour, supra; Bear* v. *Millikin Trust Co.*, 336 Ill. 366.) Whether a fee, if clearly granted, is subject to forfeiture by reason of language subsequently restrict-

> ing its use, is recognized in the application of this section as a question distinct from the issue, here presented, whether an estate less than a fee is essentially described in the words of limitation. (*Branch* v. *Central Trust Co.*, 320 Ill. 432; *Harder* v. *Matthews*, 309 id. 548; *Bauman* v. *Stoller*, 235 id. 480.) The doctrine applied in the former instance, that words following the grant, apparently reducing the estate conveyed, will be disregarded as repugnant to the words of conveyance, (*King* v. *Lee*, 282 Ill. 530; *Bald* v. *Nuernberger*, 267 id. 616; *Downen* v. *Rayburn*, 214 id. 342); has no application to the latter instance, *where the granting clause specifies no estate*, and the words of limitation may be construed as declaratory of the intention, so that the deed, taken as a whole, conveys the lesser estate. *Bauman* v. *Stoller, supra; Cover* v. *James*, 217 Ill. 309. (Italics ours.)

The principles established in the *Tallman* and *West* cases are equally applicable to the instant case. The Camp deed uses the words "remise, release, sell, convey and quitclaim" (R. 98). These words, like "convey and warrant" discussed in the *Tallman* case, do not alone ascertain an estate. They are entirely consistent with a grant of an easement. Furthermore, the words "or his Successor forever" used in the granting clause of the Camp deed are clearly not words of inheritance which if used would describe an estate. *Baker* v. *Scott*, 62 Ill. 86, 97; *Brelie* v. *Klafter*, 342 Ill. 622, 628; *West* v. *Fitz*, 109 Ill. 425, 436; *Coogan* v. *Jones*, 278 Ill. 279, 282; *Metzen* v. *Schopp*, 202 Ill. 275, 284; *Patterson* v. *McCay*, 313 Ill. 491, 492, 494; Kales, Future Interests, 2nd Ed. § 11. The only technical words of inheritance at common law contained the word "heirs." Tiffany, Real Property (2nd ed.), section 21. Even assuming that the word "or" in the Camp deed should be read as "and," the reference to "successor forever" does not indicate that the deed was intended to convey a fee. Easements are frequently granted in perpetuity.

The language of the Camp deed as a whole does, however, clearly indicate that the parties intended that only an easement be granted. The habendum clause expressly provided that the grantee should have the land "for railroad purposes only." Furthermore, the deed, which was given after the railroad tracks were already laid across the property (R. 98), contains covenants with respect to maintaining fences on either side of the premises and the maintaining of "all necessary crossings at grade." Obviously, the property was to be used for a right of way. To hold that a fee was conveyed by the Camp deed would be to ignore this fact and the word "only" contained in the habendum and to violate the cardinal rule of construction applicable to the Camp deed. This rule, which requires that the intention of the parties as disclosed by the entire instrument be carried out and that where possible each word and clause be given effect, was stated in the *Tallman* case in the following language (379 Ill. 441, 444):

> "* * * The cardinal and all-important one (rule) is to ascertain the intention of the parties, and such deed should be so construed as to carry out the intention as gathered from the entire instrument, and the purpose, if legal, should be carried into effect so as not to defeat the manifest intention; (*Magnolia Petroleum Co.* v. *West,* 374 Ill. 516; *Woods* v. *Seymour,* 350 id. 493;) and every word and clause within the instrument should be considered, and if possible given effect. *Lehndorf* v. *Cope,* 122 Ill. 317; *Woods* v. *Seymour, supra.*"

Petitioners contend that nothing the Illinois Supreme Court has said in the *Tallman* case "may be construed to mean that a statement of *use* 'denotes a tenure by which land is held.'" In so doing, they apparently overlooked the quotation from that case appearing on pages 10 and 11 hereof where the court said: "We therefore examine all of the words of the granting clause, * * * and ascertain the 'estate' intended to be conveyed, that is,

whether a *use* of the land, or *all* of the land, and when that intention is found, in accordance with the rules of construction referred to above, we apply the statute to any other language which may affect the estate described in the granting clause." Thus if it appears that the "use" only was granted, the estate conveyed is an easement rather than a fee. In applying this rule in the instant case the Circuit Court of Appeals said (R. 223):

> "* * * At the time of the grant, the land was farm land and the strips here involved were long and narrow, but relatively small in acreage. Although the grantor was willing to surrender dominion of these strips which flanked the track, he saw fit to provide that the railroad was 'to have and hold the land for railroad purposes only.' It would seem reasonable that the grantor meant the railroad could use the strips, but only for the expressed purposes. Such an interest to the railroad could 'well co-exist and be enjoyed and used by the grantee consistently with the ownership of the fee * * *.' *Waller* v. *Hildebrecht*, 295 Ill. 116. The words in the habendum were more than descriptive of purpose; they were the essence of the whole grant made by Camp; they were intended to describe the estate. We must therefore hold that the Camp deed gave the railroad only an easement."

Petitioners also contend that a designation of "use" could not denote tenure because the "use" is a privilege of the holder of the fee as well as a grantee of the easement. This argument ignores the well-established rule of *Waller* v. *Hildebrecht*, 295 Ill. 116, where the Illinois Supreme Court said (p. 121):

> "Generally speaking, where a particular or special right or easement in land is conveyed, which may well co-exist and be enjoyed and used by the grantee consistently with the ownership of the fee in the grantor, the fee does not pass because it is not essential to the right or interest which is described in the deed."*

* This language was approved in both the *West* case (374 Ill. 516, 520-521) and the *Tallman* case (379 Ill. 441, 452).

In the case now before this Court a particular or special right or easement in the grantee to use the land conveyed for railroad purposes only "may well co-exist and be enjoyed and used by the grantee consistently with the ownership of the fee in the grantor" from whom respondents acquired their rights. Railroads are not required to own the fee in order to construct their lines and it is common knowledge that they frequently hold only easements. In fact under the Illinois Constitution a railroad can acquire only an easement by condemnation (Constitution of the State of Illinois, Article II, Section 13). Therefore, the Circuit Court of Appeals, having found an intention to convey only the *use* of the land, correctly held, under the rule of the *Waller* case, that only an easement passed by the Camp deed.

(b) The Illinois Supreme Court's Decisions in Downen v. Rayburn, 214 Ill. 342, Tinker v. Forbes, 136 Ill. 221, and Board of Supervisors v. Patterson, 56 Ill. 111, relied upon by petitioners, do Not Support the Proposition That the Camp Deed Conveyed a Fee.

In the *Tallman* v. *E. I. & P. R. R. Co.*, 379 Ill. 441, the Illinois Supreme Court after reviewing numerous Illinois cases, including the *West* case, in which it had held that the deeds in question conveyed only an easement, said (pp. 450-452):

> "*In all of these cases words indicative of a use in the nature of an easement were given effect,* though claims were made in *Magnolia Petroleum Co.* v. *West, supra,* that the descriptive words should be disregarded as in the *Patterson* and *Downen* cases. It is to be observed also that in all of these cases the words which were given effect, while perhaps descriptive of a use or purpose, likewise taken by themselves either described an estate or an interest in land less than the entire fee, or limited the estate by the use described or by the language employed.
>
> • • • • •

> "The principle to be derived from the prior decisions of this Court on this question is that words indicating that a *right of way or easement* is granted will limit the effect of words of general warranty, either by being construed as a limitation by express words, or a lesser estate granted or conveyed by construction or operation of law." (Italics ours.)

Thus if the words used in a deed indicate that a *right of way or easement* was intended to be conveyed, those words must be given effect.

Petitioners throughout this proceeding have relied principally upon the *Patterson* and *Downen* cases referred to in the above quotation and the *Forbes* case in support of their contention that the Camp deed conveyed a fee. As pointed out in the *Tallman* case, these cases have a very limited application (379 Ill. 441, 452). In none of them did the language used indicate that a right of way was intended. The deed in the *Patterson* case provided that the lot was conveyed for the purpose of building a court house. The deed in the *Downen* case provided that the land should be used for a church location. The deed in the *Forbes* case provided that the land was conveyed "for the purpose of locating proper water-wheel and races to draw said water." There is a substantial difference between these provisions and the language of the Camp deed, particularly when the language of that deed is considered in the light of the surrounding circumstances. The Camp deed conveyed a narrow strip through a 71-acre tract, which was obviously for a railroad right of way. This was not true of the *Patterson*, *Downen* and *Forbes* cases where building lots were conveyed. Furthermore, the word "only" in the Camp deed clearly evidences an intention to grant the *use* of the land instead of *all* of the land. It should also be noted that the Illinois Supreme Court in the recent *West* case, 379 Ill. 516, held that language very similar to that contained in the *Patterson, Downen* and *Forbes* cases would, under certain circumstances, convey only an easement. (See pp. 17-18, *infra*.) The court below in constru-

ing the Camp deed has never doubted that the language used therein would create merely an easement if the entire deed could be considered in determining the question of the estate granted. In its original opinion it said (R. 214): "* * * the words used in the habendum (of the Camp deed), if given effect, would create an easement only." In its second opinion here sought to be reviewed it said (R. 223): "The words of the habendum (of the Camp deed) were more than descriptive of purpose: they were the essence of the whole grant made by Camp; they were intended to describe the estate. We must therefore hold that the Camp deed gave the railroad only an easement." No other conclusion is possible on this record and under the *Tallman* and *West* cases it would be error to ignore the language referred to.

The petitioners also refer to the cases of *Phillips Gas & Oil Co.* v. *Lingenfelter,* 262 Pa. 500, and *Quinn* v. *Pere Marquette Ry. Co.,* 252 Mich. 143, as establishing the proposition that the words "for railroad purposes only" are nothing more than a statement of the purpose of the conveyance. These cases are contrary to the great weight of authority in this country. 22 R. C. L. 868; 51 C. J. 571, Sec. 235; *Ronbauer* v. *St. Louis & San Francisco Ry. Co.* (Mo.), 34 S. W. (2d) 155, 157; *West Texas Utility Co.* v. *Lee,* 26 S. W. (2d) 457, 458.

(c) Even Assuming the Language of the Camp Deed Is Ambiguous (Which We Do Not Admit), the Circuit Court of Appeals Correctly Found That the Camp Deed Conveyed Only an Easement Under the Doctrine of Magnolia Petroleum Co. v. West, 374 Ill. 516.

The facts and decision of the Illinois Supreme Court in the recent case of *Magnolia Petroleum Co.* v. *West,* 374 Ill. 516, are stated in the following quotation from the court's opinion (pp. 523-524):

> "* * * The words of limitation in the deed from Bettie Francis to August Wiese, as applied to the

conveyance of a narrow strip running along the edge of the grantor's property from the road to the land of the grantee, discloses an intention to grant merely a right of way, and the words 'convey and warrant' are as compatible with this intention as with the conveyance of a fee. The language of limitation, 'to be used for road purpose,' is ambiguous. *Surrounding circumstances and the objects of the parties fortify the construction that an easement was intended.* The location of the Wiese property, having no connection with the road, the use of the Francis tract as a means of access, and the position of the strip, not adjoining the grantee's other tract, so that it might be utilized as more than a roadway, all compel this conclusion. *Moreover, Wiese and his heirs have interpreted the deed in accordance with this evident intention.* They did not cultivate, but used the strip only as a road. In various inventories and the lease to T. R. May, purporting to cover all of their interests in section 15, they asserted no title to the strip, and in an amended inventory, filed after the execution of the Hamilton lease, claimed an interest in it only as a roadway. *The language of the deed, the attendant circumstances and the objects in view, as well as the interpretation of the parties clearly disclose an intention to grant no more than an easement.*" (Italics ours.)

Thus the court found that language in that deed less restrictive than that in the Camp deed would, under certain circumstances, restrict the grant to that of an easement. In other words, where the "surrounding circumstances," the "objects of the parties" and the subsequent acts of the parties and their successors tend to show that an easement only was intended such facts will be taken into consideration and given effect.

The present record contains abundant evidence on these points, all of which support the conclusion that the words "for railroad purposes only" in the Camp deed were intended to limit the grant to an easement. In 1863, when the Camp deed was made, the Camps owned the land con-

veyed as well as the land on both sides of that land, a total of 71 acres (R. 95). On November 20, 1865, they conveyed the entire 71-acre tract of land to Lysander C. Jacoby (R. 100-103). This conveyance described the entire tract by metes and bounds and therefore included the strips of land mentioned in the Camp deed. *Excepted from the warranty of this deed but not from the conveyance* were "certain rights of the railroad in 1.15 acres thereof."

On December 20, 1870, the Jacobys made a deed to the Chicago & North Western Railway Company (R. 103), the successor of the grantee in the Camp deed, which conveyed, "*for the uses and purposes hereinafter stated and none other,* * * * A strip of land * * * along the westerly side of the center line of the track of said railway *as now laid down and used* by the party of the second part *upon the hereinafter described premises of the grantors,* * * * said strips of land to extend from said half section line to the southern line of the grantor's premises *whereof they are parcel* * * *." (Italics ours.) The deed then states that the railroad is "to have and to hold the said strips of land above specified and described unto the party of the second part, its successors and assigns for railroad uses and purposes and none other as fully and amply and not more so as if the same had been taken and held by condemnation under the statute, and subject also to all obligations and liabilities imposed on railroad companies respecting land taken and held by such condemnation." This deed covered substantially all of the land conveyed by the Camp deed plus some additional property.

On September 3, 1877, the Jacobys conveyed the entire 71-acre tract, including the railroad right of way, to their daughters without any reservation as to the rights of the railroad (R. 108). On August 3, 1904, one daughter conveyed her interest in the entire tract to the other without any reservation (R. 110). On March 2, 1905, Mary Ella Jacoby Hall conveyed the entire tract to respondent Cat-

lin and respondent Hicks' predecessor, strangers to the Jacoby family, and carefully provided that the conveyance was "subject to the rights of the Chicago & North Western Railroad" (R. 112).

It thus appears that the Camps, their successors in title and the railroad, in subsequent conveyances, all treated the interest of the railroad in the land described in the Camp deed as an easement only. It is particularly important to note that the railroad in 1870 accepted another deed covering substantially all of the property described in the Camp deed and in that deed, which clearly conveyed an easement only,* acknowledged that it was acquiring rights "upon the hereinafter described premises of the grantors." If it had thought it had obtained a fee to this land in 1863 through the Camp deed it certainly would not have made this admission.

At the time the Camp deed was given the railroad tracks were already laid on the land described therein (R. 98). In addition the deed contained covenants regarding cattle fences and grade crossings. It is obvious that the property was intended to be used for right of way purposes. Even where a deed of general warranty conveyed to a railroad company all land lying within 50 feet of the main track, without any reference to the purpose of the conveyance or other language indicating that it was for a restricted use, such facts have been held to necessitate that the deed be construed as conveying merely an easement of right of way. See, *e. g.*, *Abercrombie* v. *Simmons*, 71 Kans. 538, approved in *Branch* v. *Central Trust Company*, 320 Ill. 432, 442-443, and *Tallman* v. *E. I. & P. R. R. Co.*, 379 Ill. 441, 451. Consequently, even if there is any ambiguity in the phrase "for railroad purposes only" con-

* Section 13 of Article II of the Constitution of the State of Illinois of 1870, which was in effect at the time the deed referred to was given provided: "The fee of land taken for railroad tracks, without the consent of the owner thereof, shall remain in such owners, subject to the use for which it is taken." The deed in question expressly provided that the grantee was to have only the estate it would have obtained through condemnation.

tained in the Camp deed, the above facts make it clear that it was intended to grant only an easement, and, under the *West* case, it should be so construed.

Petitioners in an effort to find something to support their contentions point to the notary's certificate. It will be noted from examination of the Camp deed (R. 98) that it was apparently made out on a printed form with several interpolations and that the provisions of the notary's certificate were merely the formal statements required under the Illinois law at the time the deed was executed. The purpose of the language which the petitioners quote and rely upon at page 19 of their brief is obviously that of showing that Mary A. Camp executed the deed voluntarily and not under the compulsion of her husband. Since the certificate states that Mary A. Camp acknowledged that she released her rights "to the lands and tenements therein mentioned," in order to determine in what property she released her rights it is necessary to refer back to the body of the instrument. The language referred to by petitioners does not purport to, nor could it, increase the estate conveyed in the body of the instrument.

II.

THE USE OF THE PROPERTY IN QUESTION BY A LESSEE FROM THE RAILROAD FOR A RETAIL GASOLINE FILLING STATION IS NOT A PROPER USE.

Petitioners' statement of the question before the Circuit Court of Appeals with respect to the railroad's right to lease the premises in question for a retail gasoline filling station is obviously erroneous. They wholly fail to recognize the difference between "holding" land in fee and holding an easement only. The question in reality was: May a railroad which owns an easement to use property for railroad purposes only lease it to a private business concern for use as a retail gasoline filling station and thus cast an additional burden upon the servient estate? It was

this question that the Circuit Court of Appeals answered in the negative.

The Circuit Court of Appeals found that "The evidence clearly discloses that the use of the leased premises is for an ordinary retail gasoline filling station, * * *" (R. 224). This conclusion is not questioned by petitioners. Nor could it be. The photographs introduced as Trustee's Exhibits B, C, E, and F (R. 137, 139, 141, 143), show that the premises are presently being used for a retail gasoline filling station by a private concern. The tanks located on the leased premises are old tank cars set on concrete blocks. They are not bulk station tanks. There are no loading racks or pumps for loading gasoline out of these tanks. The tanks bear a notation that the station is a "tank car station" and are used only for advertising and for the storage of reserve gasoline for the adjoining retail station. No conclusion other than that reached by the Circuit Court of Appeals is possible on this record.

(a) The Circuit Court of Appeals Correctly Followed the Rule Approved in R. I. & P. Ry. Co. v. Leisy Brewing Co., 174 Ill. 547, in Determining That the Use of the Property in Question for a Retail Filling Station Is Not a Railroad Use.

It is inconceivable that the rule is, as contended by petitioners, that a railroad holding land under an easement for railroad purposes only could use the land either directly or indirectly for any other purpose no matter how foreign to the operation of a railroad, so long as it claimed that it might some day find some railroad use for the property. As pointed out by the Circuit Court of Appeals in the case now before this Court to so hold "would be an open invitation to abuse." (R. 225.) Thus in *R. I. & P. Ry. Co.* v. *Leisy Brewing Co.*, 174 Ill. 547, the Illinois Supreme Court, quoting from *Lance's Appeal*, 55 Pa. St. 16, said (p. 559):

> "No one can pretend that a railroad company can build private houses and mills, and erect machinery,

not necessarily connected with the use of their franchise within the limits of their right of way. If it could, stores, taverns, shops, groceries and dwellings, might be made to line the sides of the road outside of the track,—a thing not to be thought of under the terms of the acquisition of the right of way."

Although this quotation refers to the railroad's own action, obviously a railroad owning only an easement to use property for railroad purposes cannot validly authorize a use of this property for other than railroad purposes. Thus in 22 R. C. L. p. 868, Sec. 116, it is stated:

> "Where a railroad right of way is granted by deed defining and limiting the easement granted, the railroad company cannot acquire any greater rights or interest in the land *or subject it to a heavier burden or more extensive easement than the deed passes or authorizes, and it can vest in another only such right as it has itself acquired.*" (Italics ours.)

The Illinois Supreme Court, in the *Leisy Brewing Co.* case, stated that it had no doubt as to the correctness of the rule quoted from *Lance's Appeal,* although it found it inapplicable to the case then before the court. Petitioners here are contending for the precise rule which the court there observed "no one can pretend" to be the rule.

(b) The Cases of People v. Pullman Palace Car Co., 175 Ill. 125, Dauchy Iron Works v. Grunder, 150 Ill. App. 604, and Dickman v. Madison County Light Co., 304 Ill. 470, Cited by Petitioners, Are Inapplicable to This Case.

People v. *Pullman Palace Car Co.,* 175 Ill. 125; *Dauchy Iron Works* v. *Grunder,* 150 Ill. App. 604, and *Dickman* v. *Madison County Light Co.,* 304 Ill. 470, relied upon by appellees, have no application to this case. The *Pullman Palace Car* case was a *quo warranto* proceeding brought by the State to question the right of the railroad company, under its charter, to own certain property. In the *Dauchy* case a lessee defended a claim for rent on the ground that

the lease was *ultra vires* the lessor corporation. The questions involved in those cases are obviously different from that here involved. In the *Dickman* case the property in question was being used by an electric railroad for a power plant which was unquestionably a railroad use, and the only question was whether the power produced in excess of the company's present needs could be sold until needed by the railroad company. In that case the property in question at the time of the proceeding was being used for a railroad purpose primarily, while in our case the property in question is leased to the owner of a retail gasoline filling station and is not in any sense being used for a railroad purpose. This distinction was recognized by the Circuit Court of Appeals in its opinion of April 8, 1942, where it said (R. 225):

> "In the instant case the filling station was not an incident of the legitimate use of the easement; it was the use itself."

CONCLUSION.

For the foregoing reasons we respectfully submit that the Circuit Court of Appeals correctly held that under the Illinois law the grantee in the Camp deed acquired only an easement to use the property in question for railroad purposes, and that the present use of the property by the railroad's lessee for a retail gasoline filling station is not such a use. The petition for certiorari should therefore be denied.

Respectfully submitted,

ROY F. HALL,
Rockford, Illinois,
FERRIS E. HURD,
WILLIAM F. PRICE,
Chicago, Illinois,
Attorneys for Respondents.

September 9, 1942.

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IN THE

Supreme Court of the United States

October Term, A. D. 1942

No. 301

In the Matter of

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Debtor.

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY, et al.,

Petitioners,

vs.

FLORENCE G. HICKS and N. E. CATLIN,

Respondents.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

WILLIAM T. FARICY,
WILLIAM B. HALE,
LOWELL HASTINGS,
Chicago, Illinois,
Attorneys for Petitioners.

STANTON E. HYER,
Rockford, Illinois,
SIDNEY K. JACKSON,
NELSON J. WILCOX,
Chicago, Illinois,
Of Counsel.

November 4, 1942.

MC CORMICK AND HENDERSON, INC., CHICAGO

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Respondents.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Come now Charles M. Thomson, as Trustee of the property of Chicago and North Western Railway Company, the United States Trust Company of New York, as Trustee under the General Gold Bond Mortgage of the Chicago and North Western Railway Company, and James E. Lockwood, Jr., petitioners in the above entitled cause, and file this petition for a rehearing of their petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, and in support thereof, respectfully show:

I.

In the petition for a writ of certiorari filed herein on August 14, 1942, the questions presented were stated as follows (p. 6):

1. Under Illinois law, did the Camp deed convey only a right of way easement or did it convey a greater estate?

2. Even if the deed conveyed only a right of way easement, under Illinois law, is the temporary leasing of part of the property conveyed for a gasoline filling station a proper use?

II.

At this time, we wish to direct particular attention to the second question stated above and to advise the Court that a like question is awaiting decision by the Appellate Court of Illinois, Third District. The case is entitled *Mitchell* v. *Illinois Central Railroad Company, a corporation, and W. E. Beach, doing business as Illinois Independent Oil Company,* and is docketed as Number 9356. It was presented orally before the Appellate Court on October 7th, 1942, but, to date, no decision has been handed down. In that case, the Appellate Court is reviewing a decree of the Circuit Court of Mason County, Illinois, which denied the plaintiff an injunction against the Illinois Central Railroad Company and its lessee to whom it has leased a part of its right of way for a bulk and retail gasoline station. This lease is terminable upon sixty days' notice. The title of the Illinois Central to the leased property is an easement for railroad purposes. The decree of the Circuit Court of Mason County is based upon a written opinion of that Court. The petitioners did not learn that the *Illinois Central* case had been appealed until after the petition for writ of certiorari was denied herein on October 12th, 1942.

III.

In the case at bar, the petitioners have consistently urged that the Railway Trustee holds fee title to the leased property but, if this is not correct, the case at bar must be said to be strikingly similar to the pending *Illinois Central* case to which reference has just been made. This similarity can be readily seen by referring to the summary statement of the matter involved in the petition for writ of certiorari herein and also by referring to the Circuit Court of Appeals' second opinion where it is said (R. 212):

> "In 1937 the Railroad leased a portion of its right-of-way to James E. Lockwood for a 'bulk oil station and retail filling station.' The lease contained a clause empowering either party to terminate the lease by giving 30 days' notice, and excepted and reserved from its operation a strip of land 17 feet wide (or 8½ feet on each side of the tracks)."

The Circuit Court of Appeals in beginning its discussion of the question of the propriety of the use of the leased property in the present case said (R. 224):

> "The distinction between what is a proper and an improper use is not always clear and is often a question requiring nice discriminations."

We endeavored to demonstrate to this Court in our brief in support of the petition for writ of certiorari (pp. 20-24) that even if the Camp deed conveyed only a right of way easement, under Illinois law, the temporary leasing of part of the property for a gasoline filling station was a proper use. In this, we were not successful. We respectfully submit, however, that inasmuch as the issue is to be decided by the Illinois Court, the decision of the Circuit Court of Appeals should be reviewed. The question is of great im-

portance not only to these petitioners but to a number of railroads in the State of Illinois.

For the foregoing reasons, your petitioners respectfully urge that this petition for rehearing be granted and that the judgment of the Circuit Court of Appeals for the Seventh Circuit be, upon further consideration, reversed.

Respectfully submitted,

WILLIAM T. FARICY,
WILLIAM B. HALE,
LOWELL HASTINGS,
Attorneys for Petitioners.

STANTON E. HYER,
SIDNEY K. JACKSON,
NELSON J. WILCOX,
Of Counsel.

November 4, 1942.

CERTIFICATE OF COUNSEL.

I, LOWELL HASTINGS, one of the attorneys for the petitioners in the above entitled cause, do hereby certify that the above and foregoing petition for a rehearing is presented in good faith and not for delay.

LOWELL HASTINGS,
Attorney for Petitioners.